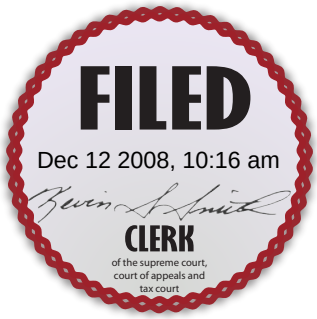

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IN THE
COURT OF APPEALS OF INDIANA

CHAD ALAN MUSICK,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 18A02-0803-CR-310
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable Marianne L. Vorhees, Judge
Cause No. 18C01-0703-FA-2

December 12, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

DARDEN, Judge

STATEMENT OF THE CASE

Chad A. Musick appeals his conviction and sentencing, after a jury trial, of possession of cocaine, as a class A felony.[1]

We affirm.

ISSUES

1. Whether the trial court abused its discretion by admitting the cocaine and other seized evidence into evidence.

2. Whether sufficient evidence exists to support his conviction.

3. Whether a juror's failure to disclose her knowledge of Musick constituted gross misconduct that caused him probable harm.

4. Whether his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

FACTS

At the time of the underlying incident, Kathy Williams was the manager of the Southern Pines Apartments in Muncie, Indiana. She had previously received "a number of documented complaints from a number of residents regarding suspected drug trafficking" at the apartment located at 4221 South Pinewood Drive. (Tr. 116). On March 6, 2007, Williams received another such complaint regarding the same apartment. The caller complained about possible drug-related activity and excessive traffic, and also called Williams' attention to a yellow Jeep sport utility vehicle seen frequently at the address and which had been associated "with some other negative incidents." (Tr. 113).

[1] Indiana Code § 35-48-4-6.

Williams drove through the complex, observed the yellow Jeep, and noted its description. She then called the Muncie Police Department and advised them as to the numerous complaints associated with 4221 South Pinewood Drive, including "fights that had been seen," "loud disturbances in the middle of the night," and "conversation that [complainants] had told [her] that . . . most of us wouldn't apply to anything but drug trafficking." (Tr. 116). She also provided the police with the license plate number and description of the yellow Jeep.

Subsequently, at approximately 3:21 p.m., Officers Millsaps, Fisher, and Kesler of the Muncie Police Department were dispatched to the Southern Pines apartment complex to investigate three vehicles -- a blue SUV, a grey Cadillac, and a yellow Jeep -- that were allegedly involved in dealing narcotics. Officers Millsaps and Fisher arrived at the scene first and discovered that none of the suspicious cars were in the complex. They notified Officer Kesler by radio communication of this fact. Officer Kesler then changed course and drove to "local known drug hangouts, [and] high crime areas." (Tr. 124). As he drove past an Econo Motel[2] complex, he observed a yellow Jeep parked in front of room twenty-five. Officer Kesler radioed Officer Millsaps and requested the license plate number of the yellow Jeep that they were seeking. Officer Millsaps responded that the license plate number was 18H4390. Officer Kesler confirmed that he had found the yellow Jeep involved in their investigation and called Officers Millsaps and Fisher to provide backup assistance at the motel.

[2] The motel was located approximately 461 feet from Southside High School.

Officer Kesler then knocked at the door of room twenty-five. A male voice asked who was at the door. Officer Kesler identified himself as "Muncie Police," and heard several voices talking and moving about in the room. (Tr. 125). A young male, later identified as Musick, answered the door. When Officer Kesler inquired about the yellow Jeep, Musick responded that he was the person driving it. From the doorway, Officer Kesler saw a crack pipe and a white straw lying on a tray on a bed approximately four or five feet from the door. Upon seeing these items, Officer Kesler entered the "[d]irty, messy" room. (Tr. 140).

The room contained two beds separated by a nightstand. Another man, Douglas Currie, was seated on the bed farthest from the door. When Officer Kesler approached the tray, he observed some white powder on the straw as well as on the tray; he also observed an off-white, rocklike substance on the nightstand. Officer Kesler's training and experience led him to believe that the former was powder cocaine and the latter was crack cocaine. Officer Kesler arrested Musick and Currie. Officers Fisher and Millsaps then arrived at the scene.

A young woman, later identified as Megan Ruble, was found lying, completely covered, in the bed closest to the door. While Officer Kesler was questioning Ruble, Officer Millsaps advised him that he had discovered two baggies of crack cocaine under the mattress of the bed in which Ruble had been sleeping. Officer Millsaps handcuffed Ruble and escorted her from the motel room. Musick, Currie, and Ruble were searched; no contraband was recovered from their persons.

In all, the search of the motel room yielded the two baggies containing 5.73 grams of crack cocaine, found between the box spring and mattress; approximately 3.45 grams of crack cocaine, found on the nightstand and floor; a bag containing three metal rods with burnt ends,[3] found in the nightstand; part of a broken glass pipe; burnt brillo pad fragments[4]; a digital scale, found on the floor between the beds; plastic zipper storage baggies; and a box of brillo pads.

On March 9, 2007, the State charged Musick with possession of cocaine within 1,000 feet of school property, a class A felony. On August 3, 2007, Musick filed a motion to suppress the evidence seized from the hotel. Thereafter, on October 18, 2007, the trial court conducted a suppression hearing. In its order of October 22, 2007, the trial court denied Musick's motion to suppress.

On November 1, 2007, the trial court conducted a jury trial. The jury found Musick guilty as charged on November 2, 2007. At the sentencing hearing on December 13, 2007, the trial court imposed a thirty-year executed sentence to be served in the Department of Correction. On January 4, 2008, Musick filed a motion to correct error, asserting as grounds for relief, juror misconduct and the erroneous denial of his motion to suppress. The trial court denied the motion after a hearing. Musick now appeals.

Additional facts will be provided as necessary.

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[3] Officer Kesler later testified that according to his training and experience, smokers of crack cocaine "use [such metal rods] to push [the drug] in so when the pipe or something is hot, they don't have to touch it . . . ." (Tr. 137).

[4] Officer Kesler later testified that smokers of crack cocaine place pieces of brillo pads into their pipes to filter out the smoke and to keep the heated crack cocaine from coming back into their mouths." (Tr. 137).

DECISION

Musick argues that the trial court erred in denying his motion to suppress; that the evidence is insufficient to support his conviction; that he is entitled to a new trial because of juror misconduct; and that his sentence is inappropriate pursuant to Indiana Appellate Rule 7(B).

1. Denial of Motion to Suppress

Musick argues that the trial court abused its discretion when it admitted the evidence seized from the motel room because it was the product of an unreasonable search in violation of the Fourth Amendment and Article 1, Section 11 of the Indiana Constitution.

The admission and exclusion of evidence falls within the sound discretion of the trial court, and we review the admission of evidence only for an abuse of discretion. *Herbert v. State*, 891 N.E.2d 67, 69 (Ind. Ct. App. 2008). An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. *Id.* We do not reweigh the evidence, and we consider conflicting evidence most favorable to the trial court's ruling. We also consider uncontroverted evidence in the defendant's favor. *Id.*

Officer Kesler's entry into the motel room constituted a warrantless search for purposes of the Fourth Amendment. "The Fourth Amendment requires the police to obtain a search warrant from a neutral, detached magistrate prior to undertaking a search of either a person or private property, except under special circumstances fitting within

'certain carefully drawn and well-delineated exceptions.'" *Sellmer v. State*, 842 N.E.2d 358, 362 (Ind. 2006) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). Because warrantless searches are per se unreasonable, the State bears the burden of establishing that the search falls within one of the well-delineated exceptions to the warrant requirement. *Smith v. State*, 889 N.E.2d 836, 839 (Ind. Ct. App. 2008). The plain view doctrine is one such exception. *Jones v. State*, 783 N.E.2d 1132, 137 (Ind. 2003). "The plain view doctrine allows a police officer to seize items when he inadvertently discovers items of readily apparent criminality while rightfully occupying a particular location." *Id*.

The facts reveal that after Officer Kesler knocked and identified himself as Muncie Police, Musick voluntarily opened the motel room door, stood in the open doorway, and conversed with Officer Kesler. From the public area outside the motel room, Officer Kesler observed a crack pipe lying in plain view on a tray inside the room. He then arrested Musick and entered the room to investigate further. On closer look, he observed white powder residue next to the crack pipe on the tray, as well as an off-white, rocklike substance that appeared to be crack cocaine on the nightstand.

The State demonstrated that Officer Kesler's seizure of the crack cocaine and crack pipe was proper under the plain view doctrine exception to the Fourth Amendment's warrant requirement. His inadvertent discovery of the crack pipe, from the public area outside the motel room, provided him with the authority to seize the item under the plain view doctrine. *See Michigan v. Long*, 463 U.S. 1032 (1983) (holding that

police may seize an object without a warrant if they are lawfully in a position to view it, if its incriminating character is readily apparent, and if they have a lawful right of access to it). Thus, we find that the trial court did not abuse its discretion in admitting the evidence.

Next, Musick asserts that Officer Kesler's entry into the motel room and his seizure of the items violated Article 1, Section 11 of the Indiana Constitution. Again, we cannot agree.

"Although the language of Article 1, Section 11 mirrors the Fourth Amendment, we conduct a separate analysis that focuses on whether the officer's conduct was 'reasonable in light of the totality of the circumstances.'" *Holder v. State*, 847 N.E.2d 930, 940 (Ind. 2006).

> [A]lthough we recognize there may well be other relevant considerations under the circumstances, . . . the reasonableness of a search or seizure . . . turn[s] on a balance of: 1) the degree of concern, suspicion, or knowledge that a violation has occurred, 2) the degree of intrusion [that] the method of the search or seizure imposes on the citizen's ordinary activities, and 3) the extent of law enforcement needs.

Litchfield v. State, 824 N.E.2d 356, 361 (Ind. 2005).

In evaluating the reasonableness of Officer Kesler's conduct, we first consider the degree of concern, suspicion, or knowledge that a violation had occurred. Officer Kesler's suspicions were understandably aroused when he saw the crack pipe, a notorious article of drug paraphernalia, lying in plain view on a tray inside the room.

Next, we consider the degree of intrusion that the method of the search or seizure imposed on Musick's ordinary activities. After receiving a dispatch to Southern Pines Apartments regarding possible drug-related activity involving a yellow Jeep, Officer Kesler observed the vehicle in front of room twenty-five of the Econo Motel, located in an area that Officer Kesler characterized as a "local known drug hangout[ ], high crime area[ ]." (Tr. 124). Officer Kesler knocked to inquire about the yellow Jeep. After Musick opened the door, Officer Kesler spoke to him from the public area outside the motel room door. His opportunity to observe the contents of the room occurred when Musick voluntarily opened the door. Officer Kesler's intrusion was minimally intrusive.

Lastly, we consider the "extent of law enforcement needs." Given the numerous complaints and the proximity of the motel room to Southside High School, as well as the possibility that Musick, Ruble, and Currie might be dealing in narcotics, Officer Kesler had reason to be concerned for public health and safety.

Based upon the foregoing, we conclude that Officer Kesler's conduct, under the totality of the circumstances, was reasonable under Article 1, Section 11 of the Indiana Constitution. Thus, the trial court did not abuse its discretion in admitting the evidence.

2. Sufficiency of Evidence

Musick next argues that the evidence is insufficient to prove that he had the requisite intent to constructively possess cocaine. When reviewing the sufficiency of the evidence, we will affirm unless, considering only the evidence and reasonable inferences favorable to the judgment and without reweighing the evidence or assessing witness

credibility, we can conclude that no reasonable factfinder could find the elements of the crime proved beyond a reasonable doubt. *Carroll v. State*, 744 N.E.2d 432, 433 (Ind. 2001). The uncorroborated testimony of one witness may be sufficient by itself to sustain a conviction on appeal. *McHenry v. State*, 820 N.E.2d 124, 126 (Ind. 2005).

In order to convict Musick of possession of cocaine as a class A felony, the State was required to prove beyond a reasonable doubt that he knowingly or intentionally possessed cocaine in an amount weighing at least three grams, within 1,000 feet from school property, a public park, a family housing complex, or a youth program center. I.C. § 35-48-4-6(b)(3)(B). Musick disputes only the possession element.

A conviction for possession of contraband may rest upon proof of either actual or constructive possession. *Britt v. State*, 810 N.E.2d 1077, 1082 (Ind. Ct. App. 2004). "Actual possession occurs when the defendant has direct physical control over the item, while constructive possession involves the intent and capability to maintain control over the item even though actual physical control is absent." *Id*. At trial, the State advanced a theory of constructive possession.

> Evidence of constructive possession is sufficient where the State proves that the defendant had both the capability and intent to maintain dominion and control over the contraband. To prove the intent element, the State must demonstrate the defendant's knowledge of the presence of the contraband. Knowledge may be inferred from the exclusive dominion and control over the premise containing the contraband or additional circumstances indicating the defendant's knowledge of the contraband if the control over the premise is non-exclusive. Evidence that the defendant is able to reduce the contraband to the defendant's personal possession is sufficient evidence to establish the defendant had the capability to maintain dominion and control over the item. Proof of dominion and

> control over contraband has been found through a variety of means: (1) incriminating statements by the defendant, (2) attempted flight or furtive gestures, (3) proximity of the contraband to the defendant, (4) location of the contraband within the defendant's plain view, and (5) the mingling of contraband with other items owned by the defendant.

Goliday v. State, 708 N.E.2d 4, 6 (Ind. 1999) (internal citations omitted); *Henderson v. State*, 715 N.E.2d 833, 836 (Ind. 1999).

Here, the State presented the testimony of Currie and Ruble to prove that Musick constructively possessed the crack cocaine found in the motel room.[5] Currie testified that on March 4, 2007, he paid for a room in the Econo Motel. The room was registered in Ruble's name. Currie testified that he and Musick were going to stay there, "but there were different people in and out." (Tr. 162). Currie testified that he and Musick smoked cocaine together, and that any cocaine found in the room was "[e]ither what we had brought with us or what [Musick] had purchased." (Tr. 163). He explained his and Musick's arrangement for procuring cocaine as follows: Currie financed the purchase of the cocaine, and Musick "would go out and bring it back." (Tr. 164).

Currie testified further that on March 6, 2007, Musick left the motel and drove the yellow Jeep to the Southern Pines Apartment complex to buy cocaine from a resident. He testified that Musick later returned with a quantity of cocaine, and that within approximately twenty to forty minutes, Officer Kesler knocked at the motel room door. With regard to the cocaine found on the nightstand and on the floor, Currie admitted that

[5] Currie and Ruble averred that they were each awaiting prosecution for class A felony possession of cocaine, and that they were testifying in hopes of getting some consideration in exchange for their truthful testimony.

either he or Musick brought those drugs into the room; however, as to the cocaine found between the mattress and box springs, Currie averred that Musick had brought those drugs into the motel room. In the following colloquy, Currie explained what he and Musick did when Officer Kesler knocked and identified himself as Muncie Police:

> Q: . . . [Y]ou say you swept the cocaine off [the nightstand] onto the floor -- what did [Musick] do?
>
> A: I was busy looking around and making sure I cleaned stuff up in case [the police] were going to come in. I know [Musick] was moving around on the other bed to do the same, I believe. I think he placed something under the bed, but I couldn't be positive.
>
> Q: Did you see him lean over the bed?
>
> A: Yes.
>
> Q: Did you see him reach as if he was putting something underneath the bed?
>
> A: Yes, but again, I couldn't tell you what it was.

(Tr. 166).

Ruble testified that she and Musick were romantically involved at the time of their arrests and had shared her bed. She testified that she, Currie, and Musick had been in the motel room "partying" on and off for two days, before they were arrested on March 6, 2007. It was a both a "going away party" for Currie and Musick's "last big blow-out" before "quit[ting] using drugs." (Tr. 186). Ruble testified that she was asleep when Officer Kesler arrived at the motel room door, and was awakened by Officer Kesler's entry. She testified further that Musick had not been in the room when she went to sleep,

but was present when she awoke. Asked who had placed the cocaine between the mattress and box spring of her bed, Ruble responded, "I assume [Musick] did. He was in the bed too." (Tr. 191).

We find that the State presented sufficient evidence on the capability element. The capability element of constructive possession is met when the State shows that the defendant is able to reduce the contraband to his personal possession. *Goliday*, 708 N.E.2d at 6. The capability element is met here because the State presented evidence that two baggies of crack cocaine were found in close proximity to Musick, under the mattress of the bed that he shared with Ruble.

In light of Musick's non-exclusive dominion and control over the premises, the State presented evidence of additional circumstances in the form of testimony from Currie, Ruble, and Officer Kesler, wherefrom a reasonable inference could be drawn that Musick had knowledge of the presence of the drugs in the room. The evidence revealed that within approximately twenty to forty minutes after Musick had returned from his drug buy at the Southern Pines Apartments, Officer Kesler knocked on the door. Currie and Musick began their frenzied efforts to clean up and hide the contraband, during which time Currie saw Musick lean over the bed and reach as if to put something underneath it. Two baggies of crack cocaine were later found between the mattress and box springs of that bed.

Based upon the foregoing evidence, we conclude that the State presented sufficient evidence of additional circumstances to show that Musick was in close proximity and had

both the capability and the intent to maintain dominion and control over the contraband in the motel room. Thus, the inference of constructive possession could reasonably be drawn from the evidence presented at trial. Musick's arguments impugning Currie and Ruble's motives for testifying amount to an invitation for us to reweigh the evidence or judge the credibility of the witnesses, which we cannot do. *See McHenry*, 820 N.E.2d at 124. We conclude that sufficient evidence exists to support Musick's conviction.

3. Juror Misconduct

Musick contends that the trial court erred in denying his motion to correct error and his request for a new trial because of alleged juror misconduct. Specifically, he argues that a juror failed to disclose her personal knowledge of him at trial and thereby "br[ought] her biases into trial, without disclosing them in advance, subject[ing] [him] to probable harm." Musick's Br. at 9. We cannot agree.

A defendant seeking a new trial because of juror misconduct must first establish that the juror's behavior amounted to misconduct, and that such misconduct (1) was gross and (2) probably harmed him or her. *Griffin v. State*, 754 N.E.2d 899, 901 (Ind. 2001). We review the trial judge's determination on these points only for an abuse of discretion, with the burden on the appellant to show that the misconduct satisfies the requirements for a new trial. *Id*. An abuse of discretion occurs when the decision is clearly against the logic and effect of the facts and circumstances before the trial court. *Majors v. State*, 773 N.E.2d 231, 235 (Ind. 2002).

During voir dire, the trial court asked jurors whether they knew defendant Musick or any of the potential witnesses. Juror M.N. did not indicate any prior knowledge of Musick, but stated that she recognized the name of defense witness Trudy Said. Juror M.N. explained that Said is the niece of one of her tenants. Said is also Musick's ex-girlfriend and the mother of his minor children. The trial court asked Juror M.N. whether she had any knowledge of Said that would lead her to give more or less credibility to her testimony; Juror M.N. responded, "No." (Tr. 38). The trial court gave counsel the opportunity to question Juror M.N. regarding her knowledge of Said. Counsel did not question Juror M.N. further on this point, nor was she removed from the panel.

At the sentencing hearing on December 13, 2007, Musick testified that Juror M.N. had looked familiar to him during voir dire. He communicated this impression to his counsel; however, neither of them brought the matter to the trial court's attention.

At the subsequent hearing on the motion to correct error, Juror M.N. testified that initially, during voir dire, she had not recognized Musick, but later realized who he was when Trudy Said was listed as a potential witness. Juror M.N. testified that she now recalled having seen Musick in the vicinity of her rental apartments, but could not recall having ever spoken to him. She also denied having any knowledge of his personal history or activities, beyond the fact that he had fathered Said's children. Juror M.N. also testified that once she realized who Musick was, she disclosed her knowledge of him during voir dire. The transcript of the hearing does not, however, reveal any such statement to the trial court.

At the same hearing, Said testified that she and Juror M.N. had discussed Musick on two prior occasions. She testified that on one occasion, she told Juror M.N. that Musick was incarcerated for breaking and entering, and that he would be a better person if he stayed away from drugs. Said testified that on the other occasion, Juror M.N. asked how Musick was doing, and she responded that he was improving.

In denying Musick's motion to correct error, the trial court expressed its skepticism at Musick's claim that although Juror M.N. had looked familiar, he had not been able to recognize her by name. The trial court opined that Musick not only recognized Juror M.N., but likely remained silent about the fact for strategic reasons. In its order, the trial court stated, in relevant part, the following:

* * *

> 9. The Court finds this statement [that Musick thought Juror M.N. looked familiar, but could not identify her by name] is not credible. The Court identified [Juror M.N.] by her name, and then [Juror M.N.] stated she knew Trudy Said, a potential defense witness, because she rented to Trudy Said's aunt. Even if [Musick] did not recognize [Juror M.N.] by name, he knew this was his girlfriend's aunt's landlord. It is apparent that [Musick] believed this juror would be favorable to him (because she knew he had a girlfriend and small children), and he did not want his attorney to question the juror further, which might have caused the State to dismiss her as a juror. This was a strategic decision by [Musick].
>
> 10. In order to warrant a hearing based upon a juror misconduct claim, the defendant must show by specific, substantial evidence that the juror was possibly biased. *Lopez v. State*, 527 N.E.2d 1119, 1130 (Ind. 1998). The allegations in the Motion to Correct Error and the supporting affidavits do not reach this level. All [Musick] has alleged is the juror knew him. He does not state how this prior knowledge caused the juror to have a bias against [him]. The Court finds the Motion to Correct Errors, as related to

the juror misconduct claim, is insufficient on its face, and should be denied.

11. In the alternative, if it is later found that the Motion is not deficient on its face, the Court finds a defendant must show two things in order to obtain a new trial based on juror misconduct: first, the misconduct was gross; and second, the misconduct probably harmed the defendant. *Hoskins v. State*, 737 N.E.2d 383, 385 (Ind. 2000).

12. [Musick] has not demonstrated the misconduct was gross. Although it would have been preferable for the juror to disclose that she might know the defendant, the juror's conduct does not reach the level of gross misconduct. The alleged relationship between the juror and [Musick] is very slight.

***

15. The Court finds the misconduct does not rise to the level of 'gross misconduct' sufficient to grant relief. Even if [Musick] did demonstrate 'gross misconduct,' [he] has not made the additional showing necessary for relief, that the misconduct harmed him. [Musick] has not stated what additional information (other than the evidence produced at trial) the juror would have had, which would have been prejudicial to him. The jury already knew [Musick] had served time in the Department of Correction on two different burglary convictions, which would have had a very negative impact on the jurors' impression of [Musick]. The jury knew [that Musick] was accused of being a motel room with a substantial amount of 'crack' cocaine. This implies drug sales and/or drug use, which is also very prejudicial to [Musick].

16. Finally, the Court finds [Musick] has waived any possible allegation of misconduct. The person in the courtroom in the best position to bring this situation to the Court's attention was [Musick]. The Court could have called the juror into the courtroom outside the other jurors' presence and examined her as to her relationship with [Musick]. The Court could have replaced this juror with an alternate. It appears [Musick] made a strategic decision to leave this juror on the panel, thinking because she knew that he had two children and a girlfriend, she would be sympathetic to him, and she would persuade the other jurors to find him not guilty.

17. The Indiana Supreme Court has long held it is a party's responsibility to inform the Court about possible juror misconduct, at the 'earliest

> feasible date.' *Terrell v. State*, 745 N.E.2d 219, 220 (Ind. S. Ct. 2001), quoting *Whiting v. State*, 516 N.E.2d 1067 (Ind. S. Ct. 2001). [Musick] failed to perform his duty to inform the Court about possible juror misconduct at the earliest feasible time, which could have been during voir dire. [Musick] was not in custody during the trial, and he would have had the opportunity to discuss this juror situation with his family during the trial. He had until the juror retired to deliberate to disclose to the Court a potential problem.
>
> 18. A jury trial is not a 'game of chance' or an opportunity to 'roll the dice.' Juror misconduct is a very serious issue. Our jury system is the foundation for our criminal justice system. It is imperative that everyone participating in the system contribute toward a fair jury trial. The Court cannot take action unless the potential problem is brought to the Court's attention. A party cannot take a chance on a juror and then decide, after a conviction, to challenge the juror.

(Order 2-4).

Like the trial court, we are inclined to find that Musick has waived this claim by his failure to bring his concerns about Juror M.N. to the attention of the trial court. Notwithstanding this fact, we proceed to the merits of his claim. For all Musick's allegations of "bias on the part of [Juror M.N.]," he has not demonstrated that Juror M.N. committed 'gross misconduct that probably harmed him' by her failure to disclose during voir dire that she knew who he was. Musick's Br. at 9.

Admittedly, once Juror M.N. became aware of the connection between Said and Musick, she should have disclosed this fact to the trial court. That said, however, the fact that Juror M.N. was familiar with Said, hardly makes her biased against Musick. *See McCants v. State*, 686 N.E.2d 1281, 1285 (Ind. 1997) (holding that the trial court properly denied the defendant's motion for mistrial where one juror and a State's witness

worked for the same employer); *see also Creek v. State*, 523 N.E.2d 425, 427 (Ind. 1988) (holding that the trial court's decision to deny defendant's motion for mistrial was also proper where a juror and a State's witness were employed by the same employer, knew each other's last name, and never discussed the case).

Juror M.N.'s testimony revealed that she, like the jurors and witnesses in *McCants* and *Creek*, had only a casual relationship with Said, the niece of one of her tenants. Despite Musick's suggestion that Juror M.N.'s alleged biases may have poisoned the jury against him, her knowledge of Musick might actually have had the opposite effect. Notably, during voir dire, Juror M.N. assured the trial court that she would not deem Said's testimony to be either more or less credible based upon her prior knowledge of Said. Juror M.N. testified that her knowledge of Said did not influence her decision.

We cannot, based upon the evidence presented, find that Musick has met his burden of demonstrating that Juror M.N.'s failure to disclose her personal knowledge of him constituted gross misconduct that subjected him to probable harm. The trial court did not abuse its discretion in denying Musick's motion to correct error for alleged juror misconduct.

4. Appropriateness of Sentence

Musick argues that his thirty-year advisory sentence is inappropriate in light of his character and the nature of the offense. We are not persuaded.

We may revise a sentence if, "after due consideration of the trial court's decision," we find that the sentence is inappropriate in light of the nature of the offense and the

character of the offender. Ind. Appellate Rule 7(B). "Although Rule 7(B) does not require us to be 'very deferential' to a trial court's sentencing decision, we still must give due consideration to that decision." *Williams v. State*, 891 N.E.2d 621, 633 (Ind. Ct. App. 2008). "We also understand and recognize the unique perspective a trial court brings to its sentencing decisions." *Id*. The burden is on the defendant to persuade the reviewing court that his sentence is inappropriate. *Anglemyer v. State*, 868 N.E.2d 482, 491 (Ind. 2007); *Childress v. State*, 848 N.E.2d 1073, 1080 (Ind. 2006).

We initially note that it would be within our discretion to find that Musick has waived his request for this court to review his sentence under Appellate Rule 7(B). His argument, in its entirety, under Appellate Rule 7(B) is that his sentence is inappropriate because Ruble received "more favorable treatment" in sentencing than he did. Musick's Br. at 10. Musick presents no cogent argument regarding the inappropriateness of his sentence in light of the nature of his offense and his character. *See* App. R. 46(A)(8)(a); *Ford v. State*, 718 N.E.2d 1104, 1107 n.1 (Ind.1999) (holding that defendant's argument is waived for failure to state a cogent argument).

Waiver notwithstanding, we proceed to review Musick's sentence. The advisory sentence for a class A felony is thirty years. Although the State sought a forty-year sentence, the trial court imposed the advisory sentence citing potential hardship to Musick's young children and his strong family backing and support, giving these mitigating circumstances "minimal weight" and "some weight" respectively. (Sentencing

Order 1). The trial court gave "substantial weight" to Musick's two prior felony convictions for burglary, as class B felonies.

Our review of the nature of the offense reveals that Musick possessed more than three grams of crack cocaine within 1,000 feet of school property. Although there is not much under these facts to distinguish this offense from the typical drug possession offense, our review of Musick's character indicates a genuine need for improvement.

Musick has served executed sentences in the Department of Correction on two prior convictions for burglary, as class B felonies. He has been placed on supervised probation twice and twice had the benefit of sentence modifications. Most notably, Musick was arrested for this offense less than two months after he finished serving a sentence imposed pursuant to a revocation of probation on an unrelated offense. Despite having had prior opportunities at rehabilitation and correctional treatment, Musick continued to "expose[ ] himself to cocaine and the people he knew were using cocaine . . . ." (Order 1).

The following colloquy, in which the prosecutor questions Musick about his history of incarceration, is particularly instructive to our review of his character.

> Q: . . . . How much time have you spent in prison?
>
> A: A little over eight (8) years.
>
> Q: And . . . you're thirty-four (34) now?
>
> A: Now, I'm thirty-two (32), getting ready to turn thirty-three (33) next month.

> Q: So in fourteen (14) years as an adult, you've spent eight (8) behind bars?
>
> A: And I'll give you the other six (6) on probation or parole. I ain't [sic] got a chance to get out and get started. You people keep having me back in here.

(Tr. 312). In light of Musick's apparent aversion to personal accountability, his unwillingness to refrain from criminal activity, and his unhealthy associations with drug users -- the last of these being particularly sad, given his responsibilities to his minor children, nothing about his character renders the thirty-year advisory sentence imposed in this case inappropriate.

Affirmed.

FRIEDLANDER, J., and BARNES, J., concur.